
Introduced by Senator Romero

February 14, 2003

An act to amend Section 261 of the Penal Code, relating to rape.

LEGISLATIVE COUNSEL'S DIGEST

SB 238, as introduced, Romero. Rape: withdrawal of consent.

Existing law defines the crime of rape as an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under specified circumstances. The California Supreme Court has ruled that a defendant may be found guilty of rape if the victim, having consented, withdraws that consent during intercourse and communicates that withdrawal.

This bill would codify this ruling, and would provide that, in determining a defendant's guilt in a withdrawn consent case, the totality of the circumstances surrounding the withdrawn consent shall be considered, including, but not limited to, whether a reasonable person would have understood the consent to be withdrawn and whether the defendant responded to that withdrawal within a reasonable time.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 261 of the Penal Code is amended to
2 read:
3 261. (a) Rape is an act of sexual intercourse accomplished
4 with a person not the spouse of the perpetrator, under any of the
5 following circumstances:

1 (1) Where a person is incapable, because of a mental disorder
2 or developmental or physical disability, of giving legal consent,
3 and this is known or reasonably should be known to the person
4 committing the act. Notwithstanding the existence of a
5 conservatorship pursuant to the provisions of the
6 Lanterman-Petris-Short Act (Part 1 (commencing with Section
7 5000) of Division 5 of the Welfare and Institutions Code), the
8 prosecuting attorney shall prove, as an element of the crime, that
9 a mental disorder or developmental or physical disability rendered
10 the alleged victim incapable of giving consent.

11 (2) Where it is accomplished against a person's will by means
12 of force, violence, duress, menace, or fear of immediate and
13 unlawful bodily injury on the person or another.

14 (3) Where a person is prevented from resisting by any
15 intoxicating or anesthetic substance, or any controlled substance,
16 and this condition was known, or reasonably should have been
17 known by the accused.

18 (4) Where a person is at the time unconscious of the nature of
19 the act, and this is known to the accused. As used in this paragraph,
20 "unconscious of the nature of the act" means incapable of
21 resisting because the victim meets one of the following conditions:

22 (A) Was unconscious or asleep.

23 (B) Was not aware, knowing, perceiving, or cognizant that the
24 act occurred.

25 (C) Was not aware, knowing, perceiving, or cognizant of the
26 essential characteristics of the act due to the perpetrator's fraud in
27 fact.

28 (D) Was not aware, knowing, perceiving, or cognizant of the
29 essential characteristics of the act due to the perpetrator's
30 fraudulent representation that the sexual penetration served a
31 professional purpose when it served no professional purpose.

32 (5) Where a person submits under the belief that the person
33 committing the act is the victim's spouse, and this belief is induced
34 by any artifice, pretense, or concealment practiced by the accused,
35 with intent to induce the belief.

36 (6) Where the act is accomplished against the victim's will by
37 threatening to retaliate in the future against the victim or any other
38 person, and there is a reasonable possibility that the perpetrator
39 will execute the threat. As used in this paragraph, "threatening to



1 retaliate” means a threat to kidnap or falsely imprison, or to inflict
2 extreme pain, serious bodily injury, or death.

3 (7) Where the act is accomplished against the victim’s will by
4 threatening to use the authority of a public official to incarcerate,
5 arrest, or deport the victim or another, and the victim has a
6 reasonable belief that the perpetrator is a public official. As used
7 in this paragraph, “public official” means a person employed by
8 a governmental agency who has the authority, as part of that
9 position, to incarcerate, arrest, or deport another. The perpetrator
10 does not actually have to be a public official.

11 (8) *Where consent, once given, is withdrawn by the victim*
12 *either before or during sexual intercourse, and the act is*
13 *accomplished or continued through any of the means set forth in*
14 *paragraphs (1) to (7), inclusive, after the victim’s communication*
15 *of that withdrawal. In determining a defendant’s guilt under this*
16 *paragraph, the totality of the circumstances surrounding the*
17 *withdrawn consent shall be considered, including, but not limited*
18 *to, whether a reasonable person would have understood the*
19 *consent to be withdrawn and whether the defendant responded to*
20 *that withdrawal within a reasonable time.*

21 (b) As used in this section, “duress” means a direct or implied
22 threat of force, violence, danger, or retribution sufficient to coerce
23 a reasonable person of ordinary susceptibilities to perform an act
24 which otherwise would not have been performed, or acquiesce in
25 an act to which one otherwise would not have submitted. The total
26 circumstances, including the age of the victim, and his or her
27 relationship to the defendant, are factors to consider in appraising
28 the existence of duress.

29 (c) As used in this section, “menace” means any threat,
30 declaration, or act which shows an intention to inflict an injury
31 upon another.

